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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the mere receipt of compensation benefits paid without award constitutes an award in a compensation order filed by the Deputy Commissioner or Benefits Review Board, as proscribed by 33 U.S.C. 933(b)?

2. Whether the *Czaplicki* conflict of interest exception to 33 U.S.C. 933(b) applies to the present matter?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Decision of the Court Below That Respondent Is Not Time Barred From Instituting Suit Should Be Affirmed 2

(a) Section 33(b) Specifically Requires That an Award in a Compensation Order Must be Filed by the Deputy Commissioner or Board Before an Assignment of the Longshoreman's Claim Against a Third Person Occurs. This Section Should be Strictly Construed so as to Satisfy the Terms of the Provision and the Congressional Purpose 2

(1) The Legislative History of 33 U.S.C. 933(b) 7

(2) The Act as a Comprehensive Scheme 14

(3) The Decisions of the Lower Courts 20

(4) The Present Matter 27

(b) The Issue of a Conflict of Interest Between the Injured Longshoreman and His Employer Has Not Been Raised in This Case and Therefore Has No Critical Application to the Essential Reasoning of the Court Below 29

CONCLUSION 35

EXHIBIT A 37

EXHIBIT B 38

TABLE OF AUTHORITIES

Cases

Ambrosino v. Transoceanic S.S. Co., Ltd., 675 F.2d 470 (2d Cir. 1982) 5

American Stevedores v. Porello, 330 U.S. 446 (1946) 9, 26

Brusich v. Grace Line, Inc., 56 F. Supp. 48 (S.D.N.Y. 1944) 9, 13

Collins v. Norfolk Shipbuilding & Drydock Co., 522 F. Supp. 1211 (E.D. Va. 1981) 4

Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 6

Cupo v. Isthmian Steamship Company, Inc., 56 F. Supp. 45 (S.D.N.Y. 1941) 9

Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956) 29, 30, 34

D'Amico v. Cia De Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982) 4, 25

DeMonte v. Shipping Corp. of India, Ltd., 476 F. Supp. 392 (S.D.N.Y. 1979) 5, 25

Dunbar v. Retla S.S. Co., 484 F. Supp. 1308 (D.C.N.Y. 1980) 12

Duris v. Erato Shipping, Inc., 684 F.2d 352 (6th Cir. 1982) 2

Fearson v. Johns-Manville Sales Corp., 525 F. Supp. 671 (D.D.C. 1981) 13, 22

Grasso v. Lorentzen, 56 F. Supp. 51 (S.D.N.Y. 1944), *aff'd* 149 F.2d 127 (2d Cir. 1945), *Cert. Den.* 326 U.S. 743 (1946) 5, 9, 13

Kirsch v. Bangladesh Shipping Corp., 544 F. Supp. 83 (E.D. Pa. 1982) 27

Larson v. Assoc. Container Transp. (Australia), 459 F. Supp. 561 (E.D. Va. 1978) 4, 19, 20, 22, 30
Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977) ..... *passim*
McClendon v. Charente Steamship Company, Ltd., 348 F.2d 298 (5th Cir. 1965) 10
Mitchell v. The Etna, 138 F.2d 37 (3d Cir. 1943) 5, 9
Osaka Shosen Kaisha Line v. United States, 300 U.S. 90 6
Rodriguez v. Compass Shipping Co., Ltd., 617 F.2d 955 (2d Cir. 1980) 4, 30
Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981) 14, 17, 29, 30
Simmons v. Sea-Land Services, Inc., 676 F.2d 106 (4th Cir. 1982) 4, 5, 11, 20, 23, 24
Tartaglio v. Cunard White Star Ltd., 56 F. Supp. 55 (S.D.N.Y. 1944) 9
Theodore v. Moore McCormack Lines, Inc., 516 F. Supp. 25 (S.D.N.Y. 1981) 25
Verderame v. Torm Lines, 670 F.2d 5 (2d Cir. 1982) 4, 25

Statutes

33 U.S.C. 901, *et seq.*—

§902(20) 2, 11
§903(b) 14
§904(a) 14
§905(a)(b) 15
§907-909 14
§914(a) 15
§914(d) 15
§914(e) 17, 18
§914(f) 17, 18

§914(h) 16, 18
§919(c) 16, 19
§921 17
§933(a) 31
§933(b) ..... *passim*

44 Stat. 1421 (1927) 7
52 Stat. 1168 (1938) 8
73 Stat. 391 10
20 C.F.R. 701.301(a)(7) 6

Other Authorities

H.R. Rep. No. 1945, 75th Cong., 3d Sess. §12 (1938) 8, 12, 26
S. Rep. No. 428, 86th Cong., 1st Sess. (1959) 9
S. Rep. No. 1988, 75th Cong., 3d Sess. §12 (1938) 8, 12, 26

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BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals decision that the mere acceptance of compensation benefits does not trigger the assignment provision of 33 U.S.C. 933(b) is consistent with the express language of the Longshoremen and Harbor Workers Compensation Act which demands that an award in a compensation order filed by the Deputy Commissioner or Board be issued prior to the commencement of the assignment provision of section 33(b). Further, this decision effectuates the congressional purpose of creating a comprehensive scheme whereby longshoremen are compensated while unable to pursue claims against third parties without denying them the right to later pursue such claims, pursuant to an informed decision.

Regarding the conflict of interest issue, the court below merely held that the possibility of such an argument made it hesitant to broaden the interpretation of section 33(b).

The Circuit Court's decision in this matter reflects the congressional purpose and is confined to the express language of the statute and should, therefore, be affirmed.

ARGUMENT

I. THE DECISION OF THE COURT BELOW THAT RESPONDENT IS NOT TIME BARRED FROM INSTITUTING SUIT SHOULD BE AFFIRMED.

(a) Section 33(b) Specifically Requires That an Award in a Compensation Order Must be Filed by the Deputy Commissioner or Board Before an Assignment of the Longshoreman's Claim Against a Third Person Occurs. This Section Should be Strictly Construed so as to Satisfy the Terms of the Provision and the Congressional Purpose.

The key issue before this Court can be simply noted as follows: what activity triggers the assignment provision of 33 U.S.C. 933(b)?[1] The statute calls for "acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner or [Benefits Review] Board."[2] 33 U.S.C. 933(b) 1972.

It is respectfully submitted that the holding of the court below that ". . . the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)," *Duris v. Erato Shipping, Inc.*, 684 F.2d 352 (6th Cir. 1982) is the correct and proper holding under the facts of the case at bar and is entirely

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1. 33 U.S.C. 933(b) (1972) provides: Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

2. 33 U.S.C. 902(20) provides: "The term 'Board' shall mean the Benefits Review Board."

consistent with the congressional purpose in enacting the aforementioned section; which section includes narrowly precise language relative to acceptance of an award.

The Petitioner herein relies upon several cases, predominantly out of the Fourth Circuit, which have evolved in recent years to hold that the *mere* acceptance of compensation benefits operate to commence the running of the six month statute of limitations. The Respondent submits that these cases are aberrations and in direct conflict with the clear and unequivocal wording of the Act, Congressional purpose, numerous decisions at the district court level, and the Sixth Circuit and Second Circuit Courts of Appeals.

In examining this statute it was clear to the court below that the six month time period does not begin to run until the longshoreman has accepted compensation under an award in a compensation order filed by the Deputy Commissioner. While the language of this provision seems clear and straightforward it nevertheless becomes necessary for this Court to construe this language to determine when the six month statutory bar begins to run.

Determination of the construction of this language has become necessary due to the aforementioned confusing line of decisions out of the District Courts and Court of Appeals for the Fourth Circuit. Decisions from the Fourth Circuit beginning with *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) have gradually eroded the language of section 33(b). This process began in *Ameta* with the Court's holding that although there had been no formal award of compensation, "documents . . . received, filed and accepted by the deputy commissioner constituted sufficient action and determination by

the Deputy Commissioner granting benefits to the injured longshoreman to constitute an 'award.'" *Larson v. Assoc. Container Transp. (Australia)*, 459 F. Supp. 561, 562-3 (E.D. Va. 1978); *accord, Collins v. Norfolk Shipbuilding & Drydock Co.*, 522 F. Supp. 1211 (E.D. Va. 1981).

Most recently, the Fourth Circuit has utilized the concept of the "informal award" articulated in *Ameta* and *Larson*, to justify their holding in *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982) that the mere acceptance of compensation benefits by the injured worker constitutes "acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner or Board."

To further complicate the issue, a variety of arguments and rules have been made to avoid the effects of section 33(b) of the Longshoremen and Harbor Workers Compensation Act ("Act"). Requirements for full appraisal have been imposed.[3] Mandates that the longshoreman must first receive a fixed compensation amount have issued.[4] Courts have held that the order can be formal

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3. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955, 959 (2d Cir. 1980) (The Deputy Commissioner need not file a formal compensation order for the assignment provision to commence provided the employee knew he was foregoing his right to sue by acceptance of a compensation argument); *D'Amico v. Cia De Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982) (An award in a compensation order does not issue where a longshoreman was not represented by counsel, was not favored with a conference before a claims examiner and received no notice of the six month limitation period in that it is not at all clear that he knew or can be charged with knowing the legal implications of accepting a final compensation award.)

4. *Verderame v. Torm Lines*, 670 F.2d 5, 7 (2d Cir. 1982) ("We hold that until the amount of compensation benefits to be received by the injured longshoreman is fixed, either by order, stipulation of the parties, or informal award, there cannot be an "acceptance of compensation under an award in a compensation order" within the meaning of §33(b) of the Act.")

or informal,[5] or that the Deputy Commissioner's action can be official or unofficial.[6] Arguments have ensued regarding the subrogation rights of employees and employers as offering protection to them once assignment has occurred.[7] Debate has also centered on the quantum of activity required of the Deputy Commissioner.[8]

Respondent respectfully submits that the foregoing arguments have served to create an obscurity in the statute, which have directed courts' attentions away from

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5. *Grasso v. Lorentzen*, 149 F.2d 127, 129 (2d Cir. 1945) ("Although the award may be informal, [citations omitted]. It must amount to an award by the Deputy Commissioner."); *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097, 1102 (". . . an award in a compensation order does not require formal entry of an award *per se*."); *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982) ("Having determined that section 933(b) contemplates an informal award. . .").

6. *Grasso v. Lorentzen*, 149 F.2d 127, 128 (2d Cir. 1945) ("As a result of the amendment there must now be some official action by the Deputy Commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against a third person."); *Ambrosino v. Transoceanic S.S. Co., Ltd.*, 675 F.2d 470, 472 (2d Cir. 1982) ("The amendments recognize the importance of an official informal conference in which an agreement approved by the Department of Labor has the same final and binding effect as a formal compensation order issued after a contested proceeding.")

7. The "acts of ratification" test delineated in *Ameta*, gained support by the Courts' finding that longshoremen had subrogation rights against employers once assignment becomes effective. *Ameta*, 564 F.2d at 1103. Affirming the district court's allowance of an employer to intervene in its employer's action for damages, the Third Circuit stated "it is only the right of action against third persons which an employer foregoes by paying compensation without an award. It's right to reimbursement out of the recovery for the employee's injury remains unaffected." *Mitchell v. The Etna*, 138 F.2d 37, 41 (3d Cir. 1943).

8. *DeMonte v. Shipping Corp. of India, Ltd.*, 476 F. Supp 392, 397 (S.D.N.Y. 1979) ("The action can be informal, such as a simple notation by the Deputy Commissioner in his records showing the disposition he has made of the Plaintiff's claims. [citations omitted] But there must be some action.) *Ameta, supra* at note 7 ("acts of ratification" and "sufficient affirmative action" by the Deputy Commissioner.)

the conclusive, unambiguous statutory language. Congress, in enacting and amending section 33(b) created a provision capable of construction upon its words alone. *Osaka Shosen Kaisha Line v. United States,* 300 U.S. 90. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm. v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). It is therefore clear that in interpreting the "award language" in section 33(b) that the assignment provision does not become effective until the passage of six months after a longshoreman accepts compensation which has been paid pursuant to an award in a compensation order which has been filed by the Deputy Commissioner, his designee[9] or the Benefits Review Board. In other words, unless the Deputy Commissioner, his designee, or the Board issues an award in a compensation order, an assignment will not occur.

The elements required to cause an assignment of a longshoreman's right of action against a third party tortfeasor are clearly set forth in section 33(b). The requirements are:

1. A longshoreman's acceptance of compensation;
2. which was paid under an award in a compensation order;
3. said order being filed by the Deputy Commissioner or Board;[10] and

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9. 20 C.F.R. 701.301(a)(7) provides: "Deputy Commissioner" means a person appointed as provided in section 39 and 40 of the LHWCA or his designee, authorized by the Director to perform functions with respect to the processing and determination of claims for compensation under such Act and its extensions as provided therein and in this subchapter.

10. For the purposes of the present Brief, and in light of footnotes 2 and 9, Respondent's references to the Deputy Commissioner will include his designees, as authorized by the Director, and references to the Board shall be interpreted as the "Benefits Review Board."

4. the passage of six months from the date of said award in the compensation order, without the longshoreman first filing suit.[11]

The second element poses the controversy between the present parties. What constitutes an "award in a compensation order?" The third element provides a portion of the answer: an award in a compensation order is something which must be filed by the Deputy Commissioner or Board and therefore, cannot be a mere form or series of forms filed by the employer or its insurer.

In that obscurity has been created in the interpretation of section 33(b), a review of the legislative history of section 33(b), from its inception to the present time, as well as a review of the Act, in its entirety, and prior judicial interpretations of section 33(b), is of assistance in defining an "award in a compensation order."

(1) The Legislative History of 33 U.S.C. 933(b).

The Longshoremen and Harbor Workers Compensation Act was originally enacted in 1927, by the Sixty-Ninth Congress. Section 33(b)[12] provided, in no uncertain terms, that the mere acceptance of compensation by a longshoreman operated as an automatic assignment to the employer of all rights the longshoreman may have had against a third person for injuries sustained.

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11. Respondent does not contest that section 33(b) has a six month statute of limitations; the present issue is when this provision commences.

12. The 1927 Act provided: (b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the Deputy Commissioner of his election. 44 Stat. 1421 (1927).

In response to the grave injustice[13] caused by the 1927 Act, the Seventy-Fifth Congress amended section 33(b), effective 1938.[14] By adding the phrase "under an award in a compensation order filed by the deputy commissioner," the legislature's purpose of providing an opportunity to the injured person to consider the effect of electing to receive compensation or instituting suit against the tortfeasor was met.[15] No longer was the mere acceptance of compensation payments sufficient to effect an assignment of an injured longshoreman's claim. The 1938 amendment made it imperative that the compensation be received pursuant to an award in a compensation order filed by the Deputy Commissioner. This stringent addition to section 33(b) of the Act was to "provide payments during the period while the employee [was] unable to

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13. Senate and House Reports provided: "The purpose of this amendment is to remove possible cause of complaint regarding subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tortfeasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice." H.R. Rep. No. 1945, 75th Cong., 3d Sess. §12 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. §12 (1938).

14. The 1938 Amendment provided: (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person. 52 Stat. 1168.

15. Senate & House Reports provided: ". . . The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person, or to the beneficiaries in the case of death, to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury." H.R. Rep. No. 1945, 75th Cong., 3d Sess. §12 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. §12 (1938).

earn, when they [were] sorely needed, without compelling him to give up his right to sue a third party when he [was] least fit to make a judgment of election." *American Stevedores v. Porello*, 330 U.S. 446, 456 (1946).

Courts reviewing the 1938 amendment to section 33(b) clearly understood and effectuated the congressional purpose. Consistently, the courts held that something more than the mere acceptance of compensation, i.e. an award in a compensation order filed by the Deputy Commissioner, was needed to effect an assignment of the injured person's cause of action.[16]

Finding that the Act, as amended in 1938, continued to work a hardship on longshoremen by forcing them to take compensation under the Act because of the risks involved in pursuing a lawsuit against a third party, Congress again amended the Act, effective August 18, 1959.[17]

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16. *Grasso v. Lorentzen*, 56 F. Supp. 51 (S.D.N.Y. 1944), *aff'd* 149 F.2d 127 (2d Cir. 1945), *Cert. Den.* 326 U.S. 743 (1946) (Act intended to make assignment effective only when compensation was accepted in accordance with such Act.); *Cupo v. Isthmian Steamship Company, Inc.*, 56 F. Supp. 45 (S.D.N.Y. 1941) (Mere acceptance of compensation is not enough); *Mitchell v. The Etna*, 138 F.2d 37 (3d Cir. 1943) (Need an award in a compensation order filed by the Deputy Commissioner) *Tartaglio v. Cunard White Star Ltd.*, 56 F. Supp. 55 (S.D.N.Y. 1944) (Acceptance of compensation is not equal to an election); *Brusich v. Grace Line, Inc.*, 56 F. Supp. 48 (S.D.N.Y. 1944) (A condition precedent to the effective transfer to employer from employee is the acceptance under an award in a compensation order filed by the Deputy Commissioner).

17. S. Rep. No. 428, 86th Cong., 1st Sess. (1959) provides:

". . . However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the

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This amendment added a provision which entitled an injured longshoreman to both accept compensation payments and commence an action against a third party provided the action was instituted within six months "after such award."[18] The 1959 amendment reaffirmed the 1938 amendment which required that a longshoreman could only assign his or her interest in bringing suit against a third party, by accepting compensation under an award in a compensation order filed by the Deputy Commissioner. Therefore, the 1938 language was simply supplemented; the prior understanding of section 33(b), regarding the requirements of an "award" was left intact. Additionally, the 1959 amendment allowed the longshoreman six months after such award to make his or her decision as to whether or not to pursue the claim. The Fifth Circuit succinctly noted, that "The 1959 amendments did not change the nature of the assignment; they merely delayed its operation for six months." *McClendon v. Charente Steamship Company, Ltd.*, 348 F.2d 298, 302 (5th Cir. 1965).

Footnote continued—

risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit—those who, in effect, purchase an injured employee's claim for their own monetary advantage."

18. The 1959 Amendment provided: (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award. 73 Stat. 391.

Congress made the most recent amendment to section 33(b) in 1972.[19] Only the words "or Board"[20] were added. "Board" is defined as "Benefits Review Board" at 33 U.S.C. 902(20). The 1972 amendment, consistent with the prior amendments, makes it clear that an injured longshoreman has six months from the acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner or the Board in which to file suit against a third party.

Respondent submits that the plain language of section 33(b) should be dispositive of the issue at bar. Congress has amended this provision on three separate occasions. It must be assumed Congress was aware of the legal conflicts arising out of this provision as well as the rights of the various parties. Despite some decisions issuing a utilitarian[21] approach to the administrative logistics in-

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19. 33 U.S.C. 933(b), effective October 27, 1972, P.L. 92-576, §15 (f)-(h), 86 Stat. 1262.

20. The 1972 amendment provided: (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

21. The court in *Liberty Mutual Ins. Co. v. Ameta*, 564 F.2d 1097, 1103 (4th Cir. 1977), found in its decision that the filing of certain documents was sufficient affirmative action to constitute an award "logical" in light of its belief that a "stevedore-employer should not be required to controvert every claim for compensation under the Act . . ." Similarly, the Fourth Circuit justified a three part test by stating that the "rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer . . ." *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982). However, a district court noted, "while an arrangement which would expedite the "award," and resulting assignment, might, in certain circumstances, be beneficial both to employers and to employees, in that it would permit the employer . . . to proceed with the Court action without superfluous administrative hurdles,

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volved in implementation of benefits under the Act, the plain fact remains that Congress has not removed the award language, and in fact, has bolstered it by adding "or Board." It is clear from the language of the statute and consistent with legislative purpose, that a longshoreman's right to control his or her claim is not assigned until six months have passed *after receiving an award in a compensation order filed by the Deputy Commissioner, his designee or Board*, despite what administrative inconveniences this might pose to employers.

The statutory language removes all doubt regarding the type of compensation required to commence the six months provision. It must be compensation received in a compensation order filed by the Deputy Commissioner, his designee or the Benefits Review Board. This language is not and should not be construed as excess baggage in the statute. It was added in 1938 with good reason—to prevent grave injustice[22]—and it has remained, without dilution, for the same reason.

To ignore this phrase is to ignore legislative purpose and will effectively mandate that when compensation, of any nature, is received a longshoreman must immediately prepare to file suit against the third party, or be forever barred after the expiration of six months from the issuance of such compensation. Such a construction would have the effect of turning back the congressional clock to the pro-

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Footnote continued—

section 33(b) does not in terms specify, and does not by implication suggest, any such procedure." *Dunbar v. Retla S.S. Co.*, 484 F. Supp. 1308, 1311 (D.C.N.Y. 1980). Respondent concurs with the *Dunbar* court. The Dunbar court cuts through policy arguments for enlarging the 33(b) assignment provision and adheres to the specific statutory language. Respondent submits that this is the better and more correct approach to interpreting the questioned provision.

22. *See supra*, Senate and House Reports, note 13.

vision of section 33(b) as it existed prior to the 1938 amendment. This clearly is not the construction of section 33(b) that Congress intended in amending the Act in 1938, 1959, and 1972.

The foregoing history shows that the "award in a compensation order" required by section 33(b) must issue from a Deputy Commissioner or Benefits Review Board.[23] However inconvenient this might be to employers or the Department of Labor is not in issue. Certainly Congress had access to statistics, such as those supplied in the Lodging on Behalf of *Amici Curiae* for the Petitioners. Despite this, Congress did not delete the questioned language, instead it bolstered it. Respondent submits that there can be no question that the six month provision does not commence until a longshoreman has accepted compensation which has been paid pursuant to *an award in a compensation order which has been filed by the Deputy Commissioner or Board.*[24] As such, and consistent therewith, compensation forms filed by employers or their insurers cannot—ever—commence the running of the time provision. To hold otherwise would effectly defeat language and purpose which has remained unchanged since 1938.

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23. *Grasso v. Lorentzen*, 56 F. Supp. 51 (S.D.N.Y. 1943) ("The language seems plain that the award must be made by a Deputy Commissioner"); *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671, (D.D.C. 1981) (". . . nor was the settlement ever submitted for approval by the Deputy Commissioner, an Administrative Law Judge, or by the Benefits Review Board. The statute clearly requires such approval.")

24. *Brusich v. Grace Line*, 56 F. Supp. 48, 49 (S.D.N.Y. 1944) ("The way in which on its face such compensation shall be accepted, in order to transfer the cause of action to the employer, and thus deprive the employee of any right to maintain suit against the third person, is definitely provided in subdivision (b). In order to accomplish the transfer the acceptance (says the statute) shall be 'under an award in a compensation order filed by the deputy commissioner.' It is solely by this kind of procedure that title to the cause of action for the injury can pass, in literal comformity with the statute, to the employer.")

(2) *The Act as a Comprehensive Scheme.*

In addition to the foregoing argument that legislative purpose provides the answer to the issue raised herein, Respondent contends that the Act, as a whole, provides further guidance.

This Court noted in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 602 (1981), that "The Act provides a comprehensive scheme governing an injured longshoreman's rights against a stevedore and shipowner." *Id., citing Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 77-78. This comprehensive scheme is embodied in 33 U.S.C. 901 (1972), *et seq.*, and provides the terms under which an injured longshoreman is entitled to compensation benefits, as well as the limitations placed thereon. Further, the Act imposes upon the various parties both rights and liabilities, and attempts to protect the rights of all the parties.

Initially, the Act provides that "every employer is liable for and shall secure payment" of compensation to his employees regardless of fault. 33 U.S.C. 904(a)(b).[25] However, an employer is not responsible for injuries resulting from intoxication, willfully harmful conduct or suicide attempts. 33 U.S.C. 903(b).[26] The employer's liability under the Act is exclusive and benefits must be paid pe-

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25. 33 U.S.C. 904 (1972) provides: (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 U.S.C.S. §§907-909]. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

26. 33 U.S.C. 903(b) (1972) provides: No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

riodically, promptly and directly to the longshoreman. 33 U.S.C. 905(a), 914(a).[27]

Compensation shall be paid without award, except where the employer controverts his liability. 33 U.S.C. 914(a). If the employer does controvert his liability, he must do so within fourteen days after knowledge of the injury, by filing a Notice of Controversion with the Deputy Commissioner. This notice must state, among other facts, the grounds upon which the right to compensation is controverted. 33 U.S.C. 914(d).[28] The Deputy Commissioner shall in any case where the right to compensation is controverted, make such investigations, cause such medical examinations to be made or hold such hearings and take

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27. 33 U.S.C. 905(a) (1972) provides: The liability of an employer prescribed in section 4 [33 U.S.C.S. §904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

33 U.S.C. 914(a) (1972) provides: Manner of payment. Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

28. 33 U.S.C. 914(d) (1972) provides: Right to compensation controverted. If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

further action as he considers will properly protect the rights of *all* parties. 33 U.S.C. 914(h).[29] When the Deputy Commissioner has conducted an investigation, he shall issue an order either rejecting the claim or making an award within twenty days of a hearing or within twenty days after notice is given if no hearing is held. 33 U.S.C. 919(c).[30]

If an employer fails to pay an installment of compensation payable without an award within fourteen days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum thereof. The ten per centum penalty is excusable by the Deputy Commissioner upon a showing by the employer that the tardy payment was not due to conditions over which he had con-

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29. 33 U.S.C. 914(h) (1972) provides: Investigations, examinations, and hearings for controverted, stopped or suspended payments. The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

30. 33 U.S.C. 919(c) (1972) provides: Investigations; orders for hearing; notice; rejection or award. The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice if given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

trol. 33 U.S.C. 914(e).[31] However, if an employer fails to pay compensation within ten days after an award in compensation becomes due, there shall be added to such unpaid compensation an amount equal to twenty per centum thereof. This amount is mandatory unless stayed by an Order issued by the Board or court. 33 U.S.C. 914(f).[32]

The statutory provisions above outlined clearly show that the Act is a "comprehensive scheme" for the purpose of protecting the rights of all of the parties. *Rodriguez, supra.* Promptly paid compensation benefits are required under a no fault provision. However, the employer may controvert a claim, if for example, the employee was intoxicated or alleges graver injuries than were actually suffered. If the employer controverts a claim and the Deputy Commissioner finds in favor of the claimant, an award in a compensation order will issue. The employer then has ten days in which to commence compensation. Failure to make payment results in a twenty per centum

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31. 33 U.S.C. 914(e) (1972) provides: Additional compensation for overdue installment payments payable without award. If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment of amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

32. 33 U.S.C. 914(f) (1972) provides: Additional compensation for overdue installment payments payable under terms of award. If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 [33 U.S.C.S. §921] and an order staying payment has been issued by the Board or court.

penalty. However, if an employer does not controvert the award, but does fail to commence compensation within fourteen days after it becomes due, the penalty is only ten per centum. The penalty provisions protect the employer by allowing him sufficient time to either make compensation payments or controvert the claim without penalty. Further the penalty provisions of section 14(e) and 14(f) *supra* provides ample incentives for employer to pay promptly.

The penalty provisions also differentiate between an "award in a compensation order," and payment without an award, in the manner of penalties applicable to each. The ten per centum penalty only applies to compensation payable without an award, whereas the twenty per centum penalty applies only to compensation payable under an award. An award issues after the Deputy Commissioner has conducted an investigation and issued an order, although an investigation may ensue at the Deputy Commissioner's discretion. The resulting conclusion is that awards in compensation orders only issue after the Deputy Commissioner has conducted an investigation, often but not solely, pursuant to a notice of controversion. "The Deputy Commissioner may upon his own initiative at any time in a case in which payments are made without an award . . . make such investigation . . . hold such hearings and take such further action as he considers will properly protect the rights of all parties." 33 U.S.C. 914(h).

The above procedure protects employers, by ensuring that the twenty per centum penalty will not apply unless an award in a compensation order has issued. In all other cases, the ten per centum penalty provision applies. *If* the mere acceptance of compensation by a longshoreman constituted an award in a compensation order, the employer would be liable for a mandatory twenty per

centum penalty ten days after the payment of compensation became due. Such a reading of the Act is incorrect and also would, if true, render the ten per centum penalty provision pointless, as it would not generally have application. Such an interpretation is not justified by the Act, as a comprehensive scheme, or the specific language of the individual provisions, since the act is intended to protect all parties involved. Such a reading imposes greater, mandatory penalties, where lesser, excusable penalties are specifically intended.

Respondent submits that the Act expressly distinguishes between awards in compensation orders and payments of compensation without award, as indicated above via the penalty provision. Further, the former result from investigations conducted by the Deputy Commissioner subsequent to a Notice of Controversion, or the Deputy's discretion, or applications of any interested party. 33 U.S.C. 919(c).[33]

Therefore, employers can obtain an award at any time by application under section 919(c) or by filing a Notice of Controversion and asking for a hearing even while continuing to pay compensation benefits voluntarily, thus avoiding the harsher penalty provisions of the act and thereby establishing a definitive time for the commencement of the running of the statute of limitations; whereby, they will, in addition to the employee, have accurate knowledge of the time under which the employee third party liability rights, if not exercised by the employee, will pass (assign) by law to them. These factors would appear to either have been ignored or not considered in the aforementioned Fourth Circuit Court decisions of *Ameta* and *Larson, supra.*

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33. See *supra*, note 30.

As a result of the Act's differential treatment of employers who fail to timely pay compensation under an award and those who similarly fail to pay compensation without award and the procedural activities necessary to ensure the issuance of an award in a compensation order, there can be no question that the mere acceptance of compensation payments does not equal an award in a compensation order sufficient to activate the assignment provision of section 33(b).

(3) *The Decisions of the Lower Courts.*

Respondents have briefly touched upon the lower court decision relied upon by the Petitioner. Further comment is in order since the Petitioner has placed great weight on the decisions issuing from the Fourth Circuit. In particular, the rules issued in *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977), *Larson v. Associated Containers Transportation (Australia) Ltd.*, 459 F. Supp. 561 (E.D. Va. 1978) and *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106 (4th Cir. 1982) are relied upon. These decisions build upon one another and are unpersuasive in that they do not follow the legislative purpose or interpret the Act as a whole. Additionally, they are founded upon inaccurate assumptions.

Presented with an issue identical to the one now raised, and facts strikingly similar, the *Ameta, supra* court after determining that formal awards *per se* are not required by section 33(b) ("the focus should properly be upon some act of ratification, *id.*, at 1102), held at page 1103 that the longshoreman's receipt of four forms[34] is

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34. The four forms are:

1. Form BEC-202 - Employer's First Report of Accident or Occupational Illness; and

(Continued on following page)

sufficient affirmative action by the Deputy Commissioner so as to constitute an award under section 33(b). The court further stated that this result was logical because it did not require an employer to controvert every claim simply to ensure the entry of a formal award in order to preserve the statutory assignment and subrogation rights of the employer.

The *Ameta* decision clearly obscures the meaning of section 33(b) by placing emphasis on considerations outside of it; for example, an employer's potential interest in his statutory assignment and subrogation rights.

As has been repeatedly stated in the foregoing arguments, the legislative history and the express provisions of the Act clearly show that it is a comprehensive scheme, capable of construction upon its specific language. As such, there is no justification for going outside the language to construe the statute.

The act does not provide that an award in a compensation order issues after sufficient acts of ratification or affirmative actions, but rather, it clearly states that such awards issue only after the Deputy Commissioner conducts an investigation.

Further, Congress must be presumed to have balanced the interests of employers and longshoremen when it decided that an award in a compensation order will not issue until an investigation has occurred. Certainly as pointed

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Footnote continued—

2. Form BEC-206 - Payment of Compensation Without Award; and
3. Form No. 6 - Attending Physician's Report; and
4. Form BEC-208 - Compensation Payment Stopped or Suspended.

Id. Liberty Mutual Insurance Co., 564 F.2d at 1101.

out hereinabove, this procedure ensures accurate determination regarding triggering of the statute of limitations and notice of same to all parties. Possibly this procedural step might burden employers attempting to preserve their potential rights, but this is a decision made by Congress, and one which cannot be lightly ignored.

The *Ameta* Court based its conclusion on mistaken facts. It believed that an employer must controvert every claim to protect its lien rights. *Id.*, at 1102 (dicta). As has been shown in section (3) of this argument, an award in a compensation order may result from a controverted claim, but they may also issue at other times. All that is necessary, as a prerequisite, is that the Deputy Commissioner conduct an investigation. Therefore, the *Ameta* holding is based on an inaccurate and misleading fact.

Respondent submits that *Ameta* is contrary to the spirit of the Act, as well as its specific language. *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671, 675 (D.D.C. 1981). Additionally, its authority must be seriously questioned in light of its reliance upon mistaken information.

Subsequent to *Ameta*, the district court for the Eastern District of Virginia held that the assignment provision of section 33(b) was triggered by the payment of compensation benefits to an injured longshoreman with the "requisite filing of documents and reports with the U.S. Department of Labor." *Larson, supra* at p. 20, at 564. The *Larson* court extensively cited from and relied on the *Ameta* decision. In effect, it set a definitive starting date for the commencement of the six month provision which starting date was the date of acceptance of payments of benefits under the Act, and found its support to do so in *Ameta*.

Expanding upon *Ameta* even further, and in so doing, further reducing a longshoreman's opportunity to consider his or her options, the Fourth Circuit, in *Simmons, supra,* at p. 20, developed a test for determining when an award in a compensation order is created.

1. The employer, having not contravened its liability, initiates compensation payments to the longshoreman;

2. the deputy commissioner files the employer's notice the compensation payments have been initiated; and

3. the longshoreman accepts any of the payments.

Simmons, id. at 109.

Respondent submits that the above test is an affront to Congress and seriously jeopardizes the continuity of the Act. The test serves to eliminate the purpose and intent of the Congress in effectuating the amendments to the Act in 1938, 1959, and 1972, and serves to revert the law to the status which prior to 1938 caused the mere acceptance of compensation payments to create an assignment.

The three elements of the *Simmons* test are activities which are assured of occurring every time a longshoreman files a claim for compensation, unless the employer controverts the claim. In that the very purpose of the Act is to provide prompt compensation for injuries, it can be generally accepted that the employee will accept the benefits offered. Recalling that the employer has a statutory duty to pay compensation and that the penalty provisions gave him an incentive to do so without contravention, it is unlikely that he would forego this obligation. Finally, it can be expected that the Deputy Commissioner would retain and file the employer's notice of compensation commenced since he is the record keeper of claims.

Another disturbing aspect of the *Simmons* test is that the second element required is the filing by the deputy commissioner Form LS-206, "Payment Of Compensation Without Award" (J.A. 48). That form has boldly displayed on the top of the page in dark letters, capitalized, the above indicated caption. The *Simmons* test would include the issuance of this form as one of the three necessary elements for determining just when an award in a compensation order is created. Surely the very boldly displayed title, standing alone, indicates the absence of an award. How could this possibly be considered to be consistent with the Congressional purpose to avoid unwitting assignments of employees' rights when the test espoused within the *Simmons* holding contains such a form which in effect informs the employee that compensation is being paid to him, *without an award?*

The three elements of the *Simmons* test are nothing more than requirements already imposed upon the respective parties. They do nothing to ensure employees have knowledge of their rights and liabilities and if upheld would create a serious impediment to the comprehensive Act by rendering many of its provisions ineffective, such as the ten per centum penalty provision. In particular, the final three amendments to section 33(b), those which solidified the rights and liabilities of longshoreman and their employers, would be had for naught.

The foregoing cases attempt to reduce the stringent assignment rule set forth in section 33(b) by inferring awards in compensation orders. Inferring awards in compensation orders, in addition to being contrary to the very words of section 33(b), violates Congressional purpose by effectively denying a longshoreman an opportunity to make an intelligent, informed decision regarding future action for his or her injuries until he or she has learned

the full extent of his or her injuries, as well as the compensation he or she can expect. Until full appraisal occurs, a longshoreman is in no position to make an informed decision as to whether or not to pursue a third party suit. *Verderame v. Torm Lines*, 670 F.2d 5, 7 (2d Cir. 1982). This is especially true when compensation is being received for an indeterminate period. In this situation, a claimant should not be forced, by judicial inference, to quickly file suit prior to knowing the extent of his or her injury. Such a requirement defeats the Congressional purpose of providing sufficient time in which to make an informed decision, which purpose has evolved over many years and through three amendments to the Act to ensure that result. Respondent contends that the assignment provision does not commence until the longshoreman receives a definite notice of full compensation via actual notice of an award in a compensation order. *See*: *DeMonte v. Shipping Corp. of India, Ltd.*, 476 F. Supp. 392 (S.D.N.Y. 1979); *Theodore v. Moore McCormack Lines, Inc.*, 516 F. Supp. 25 (S.D.N.Y. 1981); *D'Amico v. Cia De Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982).

Respondent submits that the aforementioned definite notice may be either formal or informal provided it is certain and capable of advising, or at the very least, actually notifying a longshoreman of an official action by the deputy commissioner or Board. Section 33(b) does not expressly indicate that the order be formal, and in light of the administrative burdens provoked by the number of claims filed annually, Respondent would certainly defer to the many courts which have held that informal orders comply with section 33(b).[35] However, Respondent does not agree that the order may unofficially

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35. *See supra*, Note 5, and accompanying text.

issue. Once again the very words of the statute should be reviewed, ". . . filed by the Deputy Commissioner or Board. . ." 33 U.S.C. 933(b). The words, and therefore Congress, expressly require the award in a compensation order be filed only by the Deputy Commissioner or Board acting in their respective official capacities. The statute is not satisfied by an unofficial filing—since there can then be no guarantee the order has been approved or serves to adequately notify the longshoreman of the commencement of section 33(b)'s assignment provision.

What is an award in a compensation order? Respondent submits that it is a formal or informal, official, order approved and filed by the Deputy Commissioner or Board which has the effect of adequately notifying an injured longehoreman of the commencement of the section 33(b) assignment provision. This definition is consistent with the spirit of the Act, as well as its express words. It comprehends the burdens placed on employers and the Office of Workers Compensation Programs while avoiding the grave injustices[36] caused by insufficient notice and uninformed decisions.

Respondent submits that the foregoing makes it quite clear that the mere acceptance of compensation payments is insufficient to commence the section 33(b) assignment provision. This is not a novel contention, and is one which was first stated by this Court in *American Stevedores v. Porello, supra,* 330 U.S. at 456. Such a rule is important to maintain so that longshoremen are guaranteed sufficient time to fully discover their injuries and opportunity to consider their remedies. Of equal importance, it should be noted that the various provisions of the Act represent efforts by Congress to protect rights of all of

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36. *See supra,* Senate and House Reports, Note 13, and accompanying text.

the parties. Whatever administrative hardships might arise from the Act result from Congress' purpose in creating a comprehensive scheme for the protection of all the parties. *Kirsch v. Bangladesh Shipping Corp.*, 544 F. Supp. 83, 88 (E.D. Pa. 1982).

(4) *The Present Matter*

Joseph Duris, Respondent, has yet to receive an award in a compensation order. His employer has paid compensation benefits without controvention and has caused various forms to be filed with the U.S. Department of Labor, but the Deputy Commissioner or Board have not issued any responses, nor any form entitled "Order." Due to the extent of litigation, essentially pleadings in nature, complete evidence regarding Respondent's claim file is not in the record, but this Honorable Court is requested to note that Respondent's compensation claim continues to be active. The deputy commissioner has not completed any investigation. As of this date, Respondent has not been advised of the full amount of compensation he will receive for his injuries, indeed negotiations regarding a lump sum payment are currently ongoing between Mr. Duris and the insurance carrier for his employer.

Two key forms Respondent has received are mentioned in the record. The first, Form LS-206, is entitled "Payment of Compensation Without Award" (J.A. 48). A careful review of this form clearly shows that it is not an order. Further, it was filed by Respondent's employer, not the Deputy Commissioner or Board. Finally, by its very wording, it is clearly outside the statute as it expressly states that the compensation is paid "without award." Certainly, on its face, it provides no notice to the longshoreman that by accepting such compensation "without award," he is triggering the short six month

statute of limitations. It is clear that the amendments were intended by Congress to create a situation where an injured longshoreman would have clear notice that something had occurred which might result in his loss of right to bring a third party action and that his rights would be assigned to his employer. This was the essential concern of the court below. The receipt of the Form LS-206 "Payment of Compensation Without Award" is obviously not adequate to provide such notice, particularly when the law requires payment of compensation *under an award.*

The second form noted in the record is Form LS-208 (J.A. 49). This form is entitled "Important Notice to Employee" and gives notice that Respondent has received a total amount of temporary disability. Form LS-208 is not an order, but rather a notice of compensation already paid.[37] It does not serve to notify the claimant of the commencement of the assignment provision. This is especially true in Respondent's case where he actively continues to pursue his claim for compensation benefits.

The Sixth Circuit, after reviewing section 33(b), the Congressional purpose and the facts before it held that something more was required than the mere receipt of compensation benefits to trigger the assignment provision of section 33(b) and therefore Respondent was not time barred from bringing the present action. This holding is consistent with the spirit and language of the Act. Compensation orders cannot be inferred, because in so doing, the longshoreman's statutory right to make an informed

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37. Form BEC-208, which is mentioned in Petitioner's brief, is the predecessor of Form LS-208, and was used for the same purpose. A copy of the Form BEC-208 applicable to Mr. Duris is attached hereto and marked as Exhibit A, by agreement of the parties, in that it was not available at the time of compilation of the Joint Appendix. Additionally, Form BEC-208A is attached hereto and marked as Exhibit B, by agreement of the parties.

decision is denied. Compensation orders may not result from an arbitrary number of forms filed by employers as this ignores the statutory language which requires the order be filed by Deputy Commissioner or Board. Finally, the administrative hardships which may or may not exist for the employer or the Deputy Commissioner are not a valid consideration as Congress must be presumed to have considered the consequences administratively. The Deputy Commissioner or Board must file an award in a compensation order. No other activity will satisfy section 33(b)'s assignment provision.

(b) The Issue of a Conflict of Interest Between the Injured Longshoreman and His Employer Has Not Been Raised in This Case and Therefore Has No Critical Application to the Essential Reasoning of the Court Below.

Respondent concurs in Petitioner's presentation of the law regarding the conflict of interest exception to section 33(b), which was initiated by this Court in *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956). In that case, both the employer and the third party allegedly responsible for the longshoreman's injuries were insured by the same insurance company. It was later stated by this Court that "because the carrier would be responsible for both prosecuting and defending any third-party claim, no one other than the injured longshoreman had sufficient interest in the claim to bring suit." *Rodriguez v. Compass Shipping Co.,* 451 U.S. at 606. In short, this Court created an exception to section 33(b) when a longshoreman's "rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced." *Czaplicki v. The Hoegh Silvercloud, supra,* 351 U.S. at 530.

Although the validity of this exception has been questioned on numerous occasions, this Court in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 618 (1981), determined, after reviewing section 33(b) and its amendments, "Whatever the continued validity of our decision in *Czaplicki*, a question we need not and do not decide today, these cases do not involve "the peculiar facts" on which *Czaplicki* was based." It should be noted, however, that the *Czaplicki* decision is not far reaching and is basically limited to the facts of that case. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955, 961 (2d Cir. 1980). As such, an employee would only on rare occasions be able to sustain the necessary burden of proof to invoke the exception.

The present matter also does not require this Court to decide the continued validity of *Czaplicki*. A conflict of interests problem herein is not evidenced by the record and has not been raised at any time.

Respondents respectfully submit the second question presented by the Petitioner is not in issue at all in this case. There was no allegation before the court below that there was a "conflict of interest between the injured longshoreman and his employer which precludes the operation of the assignment provisions of section 33(b) of the Act." (Petitioner's brief p. 21). There was no record made in point. The court below had no information available to know whether the *Czaplicki* exception would be applicable or not.

It is submitted that the Petitioner considerably overstates the court's concern regarding the conflict of interest question and in so doing obscures the true reasoning of the court below regarding their declination to follow the decisions of *Liberty Mutual* and *Larson, supra* at p. 22.

The court below did not base its opinion on a conflict of interest potentially existing in this matter. All that the court below held was that it was unwilling to expand its construction of section 33(b) in light of the "obvious disincentives" an employer has to bring an employee's action (J.A. 45-46). The Court was not addressing the conflict of interest exception, rather it was consistently applying its rule that "the mere receipt of compensation benefits does not trigger the assignment provision of section 33(b)" (J.A. 46). The fact that an employer may have disincentives to bring his employer's suit is consistent with the Sixth Circuit's finding that receipt of compensation is insufficient to effect an assignment, and awareness by the longshoreman as to the impact upon his rights by acceptance of benefits is essential to meet the Congressional purpose.

An expansive interpretation of the assignment provision coupled with a virtually impossible burden of proof to show an exception to it would effectively deny a longshoreman an opportunity to accept compensation benefits and recover, via tort principles, for his or her injuries. This is especially true where the employer will not bring the assigned action. The Act expressly allows a longshoreman to receive compensation and recover damages against a third person. 33 U.S.C. 933(a). If the action is assigned and the employer refuses to institute proceedings and if the *Czaplicki* exception does not apply, the longshoreman is conclusively precluded from receiving tort damages. The protection a longshoreman is offered against such an occurrence is a strict interpretation of section 33(b), as aforedescribed in the prior arguments. A strict interpretation, which is warranted by both the express words of the statute and the Congressional purpose, considers the conflict of interest arguments and balances the interests of all parties.

In holding as they did, the court below did not rely on conflict of interest arising in the present matter but rather, considered the importance of protecting the rights of all parties and the purpose of the Act. A contrary holding would force a longshoreman to make an election of remedies—an old principle, Congressionally eliminated in 1938.

The court below specifically stated in point,

> Furthermore, we believe that a broad interpretation of section 33 would vitiate the policy behind its narrowly precise language. Congress might well have sought to assign away an employee's claim only in those cases where the injured longshoreman is likely to be cognizant of the statutory assignment. Although not strictly an election of remedies, the loss of one's personal injury action through an assignment is not without potentially substantial consequences. Once the assignment has been effected, the employee loses all control over the action. Should the employer decide not to sue, the claim will expire. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). Unwilling employees should not suffer this consequence. Indeed, the "award" language was added to the statute in 1938 to prevent exactly that occurrence. H.R. Rep. No. 1945, 75th Cong., 3d Sess. 9; *Rodriguez, supra*, at 605. Prior to 1938, assignment occurred immediately upon the acceptance of compensation. Appellee's position would return the Act to its pre-1938 form with the single added protection of a six month period in which the employee, who has done no more than passively accept benefits, may or may not learn of the impending loss of his claim. (J.A. 43-44.)

The Appellate court's reference to a conflict of interest concern is from a practical standpoint made in response to the rebuttal argument propounded by the Petitioners as stated in this Court's opinion (J.A. 44), where the Petitioners maintain that an informed decision on the employer's part is, "not critical because in any instance where the injury can be traced to a negligent third party, the employer's interest in recovering the compensation paid will simultaneously protect the rights of the employee. . ." (J.A. 45).

It is respectfully submitted that the court's response was to the fallacy of the above arguments and their concern was being expressed that a conflict of interest problem could arise. A thorough reading of the Sixth Circuit opinion reflects that the court was not "greatly influenced by the doctrine of the conflict of interest," as the Petitioner represents (Petitioner's brief p. 21). The Petitioner in quoting the court below neglects to note that the court's comments relative to their concern regarding this conflict of interest question were, as indicated above, in response to the rebuttal position of the Petitioner to the court's reasoning as to why payment of a claim to an award is of value to both parties which reasoning was as follows:

> In contrast, where a claim has been paid pursuant to an award, the employee, by virtue of the claim's contravention, is likely to have been brought into sufficient contact with the statute so as to ensure some cognizance of the assignment provision. Thereafter, the employee can make an informed decision. If his employer, or its insurance carrier, appears willing to maintain the action, he may allow the right to pass, knowing that the employer is entitled to recover fully on his claim. This, perhaps, is the favored result in

light of the employer's greater ability to maintain a legal action. Alternatively, the employee will realize that he must act rather quickly or risk losing the right which the court below rendered its decision in the case

It is respectfully submitted that clearly the basis upon which the court below rendered its decision in the case at bar was to foster the Congressional purpose by literal and strict interpretation of the statute as it evolved to its present form by Congressional action. The "purposeful use of the term award" (J.A. 41) was of critical concern to the court. The court below was concerned primarily, as was Congress, that an employee under the Act not unwittingly forfeit his right to pursue a third party action and that an overly liberal construction of the obviously precise language of the statute would create conditions conducive to such a forfeiture of rights.

Petitioners would "paint the picture" that the court below principally relied upon the conflict of interest question in rendering its decision. This is simply not the case. The *Czaplicki* situation has no role in the interpretation of the provisions of section 33(b) in the case at bar.

CONCLUSION

Based on the foregoing arguments, law and history Respondent respectfully requests this Honorable Court to affirm the decision of the court below.

Respectfully submitted,

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EXHIBIT A

Form Approved, Budget Bureau No. 44-R091.3

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION PROGRAM

COMPENSATION PAYMENT STOPPED OR SUSPENDED

1. BEC CASE NUMBER: 9 4012
2. CARRIER'S NUMBER: 211-5E 3862

INSTRUCTIONS: This notice must be filed with the Deputy Commissioner within 16 days after stoppage or suspension of compensation. If payments have been stopped temporarily, or are being modified, and you intend to reinstate payments shortly, or are continuing payments, so indicate in Item 11, giving reasons.

3. NAME AND ADDRESS OF EMPLOYEE (Please print in Brackets below.)

Joseph Duris
1218 Hirzel, Apt. B
Toledo, Ohio 43605

NOTE
Retain only copies 2 and 3.

Send copies 1, 4, 5, and 6 to the Deputy Commissioner who will forward employee's copies to him.

4. NAME OF EMPLOYER: Toledo Overseas Terminal
5. ADDRESS OF EMPLOYER: 3119 St. Lawrence Drive, Toledo, OH
6. DATE OF INJURY: 05-19-75
7. DATE EMPLOYEE FIRST DID NOT WORK BECAUSE OF INJURY: 05-19-75
8. DATE PHYSICIAN FOUND EMPLOYEE ABLE TO RETURN TO WORK: 04-22-77
9. DATE EMPLOYEE RETURNED TO WORK: 04-22-77
10. AVERAGE WEEKLY WAGE $ _____ (Maximum compensation rate $170.00 per week) MULTIPLIED BY ⅔ COMPENSATION RATE $ 74.57 (maximum)
11. GIVE REASONS WHY PAYMENTS HAVE BEEN STOPPED OR SUSPENDED: Claimant has returned to work.
12. DATE OF THIS NOTICE: 04-29-77
13. DATE LAST PAYMENT MADE: 04-26-77

14. LIST ALL DISABILITY PAYMENTS

TYPE OF DISABILITY (a)	FROM (Mo., day, yr.) (b)	TO (Mo., day, yr., exclusive) (c)	AMOUNT PAID PER WEEK (d)	NUMBER OF WEEKS PAID (e)	TOTAL (f)
TEMPORARY TOTAL	05-19-75	04-21-77	74.57	98 4/7	7,516.65
TEMPORARY PARTIAL					
TEMPORARY PARTIAL					
PERMANENT PARTIAL (See schedule)					
PERMANENT TOTAL					
PERMANENT PARTIAL (Schedule law [usual disfigurement])	PERCENT	PART OF BODY			

CC to cc and Calvert 5/3/77 H

REPORT ON THIS LINE PAYMENT FOR DIFFERENT PERIOD OR RATE THAN GIVEN IN PREVIOUS LINE — TOTAL → 7,516.65

15. LIST ALL PAYMENTS MADE ON ACCOUNT OF DEATH

a. NAMES OF DEPENDENTS	b. AMOUNT	c. OTHER EXPENSES	d. AMOUNT
		FUNERAL EXPENSE	
		NO DEPENDENTS—PAID TO TREASURER U.S.	
		TOTAL (Cols. b + d) →	

16. NAME OF INSURANCE CARRIER OR SELF INSURED EMPLOYER: Niagra Fire - Underwriters Adjusting Co., 3450 W. Central, Toledo, Ohio 43606

17. SIGNATURE OF PERSON AUTHORIZED TO SIGN FOR CARRIER: R. Dale Gilliam
18. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 17: Claims Supervisor

Form SEC-208 (Formerly Form US-208, which is obsolete) — DEPUTY COMMISSIONER